Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Streamlining Wireless infrastructure deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies Mobilitie, LLC Petition for Declaratory Ruling	**§ § § § §**	**WC Docket No. 16-421**

TEXAS MUNICIPAL LEAGUE (TML) REPLY COMMENTS

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COMES NOW the Texas Municipal League (TML) ("Texas Cities or "TML"")[1] and files these Reply Comments in the Federal Communications Commission's (hereinafter "FCC") Public Notice for Comment *In the Matter of Streamlining Wireless infrastructure deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*.[2]

I. TML Complied with the FCC's Public Notice requested "Factual Record" for a "Data-Driven Evaluation."

[1] Texas Municipal League is an unincorporated affiliation of 1,151 Texas cities. See more about TML at: https://www.tml.org/

Many of TML member cities are also members of Texas Coalition for Utility Issues and as such associates itself with the filing of the "Smart Communities" that is being filed contemporaneously with this filing. TML endorse the legal arguments and research provided in that filing.

[2] *In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling, DA* 1427, WC Docket No. 16-421, Public Notice for Comment (Dec. 22, 2016). ("PN"); *See* Mobilitie, LLC Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* (filed Nov. 15, 2016) (Mobilitie Petition).

The PN clearly set out that Comments were requested to assist the FCC in developing a "factual record" for a "*data-driven evaluation"*[3] based on specific facts. Many of the general allegations or even anecdotal examples submitted by industry commenters are probably not representative of the state of things, and certainly don't respond appropriately to the PN:

> Commenters should *provide specific information and detailed explanations* and, to the extent possible, should quantify any such effects. We will accord *greater weight to systematic data than merely anecdotal evidence*.[4]

In compliance with the PN's directives, TML provided specific, detailed facts in its March 8, 2017 filing. TML provided specific examples in Dallas, Houston, San Antonio, McAllen, and Austin. Those Texas cities have negotiated fair and reasonable master license agreements to allow wireless facilities in the rights of way.[5] TML also provided a specific example in Denison, Texas. In Denison, the delay in placement of wireless facilities in the right-of-way was due to incomplete or misleading information provided by a specifically-named wireless infrastructure company. The failure of that same company to comply with National Historic Preservations Act Section 106 Notice requirements led to the delay.[6]

Unfortunately, the industry comments were seldom as specific as the TML Comments. Many industry commenters provided at best only unsubstantiated allegations against unnamed cities (for which it is impossible to reply to correct the record). Such general, unsubstantiated allegations that do not name a city (allowing that city to respond to correct the record) should be given little, if any, weight in this proceeding.

Based on the above, TML's Comments are limited to responses to the three named Texas cities that were named in the March 8, 2017 Comments (out of 1,215 Texas cites). TML cannot

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[3] "We are issuing this public notice to develop a *factual record* that will help us assess whether and to what extent the process of local land-use authorities' review of siting applications is hindering, or is likely to hinder, the deployment of wireless infrastructure. In turn, such a *data-driven evaluation* will make it possible to reach well-supported decisions on which further Commission actions, if any, would most effectively address any problem, while preserving local authorities' ability to protect interests within their purview." PN, at 2. (Italics added)

[4] PN, at 9. (Italics added)

[5] TML Comments, March 8, 2017, at 18-19.

[6] TML Comments, March 8, 2017, at 20.

respond to unsubstantiated claims about unnamed cities or general comments about areas of the state because there is no basis for which to do so.

II. Overview to TML Reply Comments.

TML would note that seven Texas cities were named in industry comments. Four cities were described in very complementary terms: Little Elm, The Colony, Texas City, and Houston.[7] Particular praise was given to Houston by Sprint on its Super Bowl 2017 DAS deployment.[8] Out of the over twenty industry comments filed, three other Texas cities were mentioned in a less favorable light:[9] Austin, Sugar Land(allegedly not allowing wireless facilities in the rights-of-ways indiscriminately) and El Paso (alleged high rates).

On the array of legal arguments raised by industry filing, those will be addressed in some detail by others, including the Smart Communities Siting Coalition Comments of April 7, 2017. However, one legal issue raised by Crown Castle – the applicability of FCC rules to a municipality when it is acting in its proprietary capacity as a landowner and not a regulator[10] - will be addressed in these Comments in the context of Texas cities accommodating this new "indispensable" technology of small cells and Distributed Antenna Systems ("DAS").

III. Reply to Crown Castle on Legal Issues as to Municipalities' Acting in a Proprietary Role as Land Owner/Manager of Right-of-Way under Texas Law.

Crown Castle raised the applicability of FCC rules to a municipality acting in its proprietary capacity as a landowner, not a regulator. TML reviewed these issues in some detail in its March 8, 2017, Comments.[11] In this Reply, we once again review the salient legal arguments

[7] Crown Castle Comments, March 8, 2017, at i-ii, and 8-9.

[8] Sprint Comments, March 8, 2017, at iii, and 4, 7, 45-46.

[9] Crown Castle Comments, March 8, 2017, at 18. (Austin and Sugar Land, Texas)' NTCH Comments, March 8, 2017, at 10 (El Paso).

[10] Crown Castle Comments, March 8, 2017, at 26-27

[11] TML Comments, March 8, 2017, at 6-7.

in light of Crown Castle Comments, particularly in the context of Texas law and prior FCC Orders and federal and state case law.

Crown Castle ignored the FCC's recent discussion of this issue in 2014. The FCC cited long-held case law stating that certain federal timelines and other requirements (including Section 6409, 47 C.F.R. § 1.40001, et seq.) do not apply when a governmental entity is acting as a landowner in a proprietary capacity, rather than a regulator, to wit:

> …we [the FCC] conclude that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities. … As the Supreme Court has explained, "[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and when analogous private conduct would be permitted, this Court will not infer such a restriction." [fn 445] Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances [fn 446][12]

The sole case that Crown Castle cited,[13] *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002), does not support its position. The case was actually cited by the FCC as indicated above, in footnote 446, of the 2014 FCC Order, for the contrary position that there was no preemption. *Sprint* involved a school lease and conditions concerning radio frequency (RF) levels. The cellular company unsuccessfully argued that RF levels were regulated by the FCC

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[12] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order*, 29 FCC Rcd 12865, 12866-69, 12878-81, ¶ 239 (2014) (*2014 Sec. 6409 Infrastructure Order*), erratum, 30 FCC Rcd 31 (2015), *aff'd, Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015); See also FCC "Shot Clock", see *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14020, para. 67 (2009) (2009 Declaratory Ruling), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd,* 133 S. Ct. 1863 (2013).

The FCC cited in support of its statements in paragraph 239, at footnote 445, *Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island Inc.*, 507 U.S. 218, 231-32 (1993); and in footnote 446: *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity")

[13] Crown Castle Comments, March 8, 2017, at 26-27, cited in n. 44.

and thus the school district was preempted from setting different levels. The Court disagreed, finding that the school district was acting in its proprietary capacity, and not as a regulator. The language of the court is broad, concluding that a governmental entity acting in a proprietary capacity is not preempted:

> First, we see nothing in the TCA [Telecommunications Act of 1996, 47 U.S.C. § 151 et seq., "TCA" "Telecommunications Act" or "Act"] to suggest that Congress meant to preempt a governmental entity's conduct that does not amount to regulation; and the structure and language of the TCA suggest precisely the contrary intent. To begin with, the structure of § 332(c)'s paragraph (7) indicates that *Congress meant preemption to be narrow and preservation of local governmental rights to be broad,* for subparagraph (A) states that "nothing" in the FCA is to "limit or affect" local governmental decisions "[e]xcept as provided in this paragraph." 47 U.S.C. § 332(c)(7)(A) (emphases added). Thus, unless a limitation is provided in § 332(c)(7), we must infer that Congress's intent to preempt did not extend so far.
>
> Further, the language of paragraph (7) suggests that *Congress did not mean to eliminate the distinction between acts that are regulatory and those that are proprietary,* for the language in subparagraph (7)(A), preserving to local governmental entities authority except as limited in paragraph (7), refers broadly to governmental "decisions," whereas the prohibition set out in subparagraph (B)(iv) refers only to regulations. The latter states the limitation that, to the extent that a facility complies with FCC standards governing RF emissions, "[n]o State or local government or instrumentality thereof may regulate" facility construction, placement, or modification. 47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added). The contrasting terms used in (A) and (B)(iv) reveal that the preemption provision with respect to RF emissions expressly provided by Congress in (B)(iv) carves out of subparagraph (A) only such decisions as constitute "regulat[ion]."
>
> Thus, the language and structure of the *TCA implicitly recognize that some governmental decisions are not regulatory and reveal that Congress meant "nothing" in the FCA to limit or affect the authority of a governmental entity "over decisions" as to the construction, placement, or modification of personal wireless service facilities on the basis of RF emissions "[e]xcept" to the extent that those decisions constitute "regulat[ion]."* …… [Page 421]
>
> Further, *a private party who has the right to refuse outright to lease his property also has the right to decline to lease the property except on agreed conditions* (assuming those conditions would not violate law or public policy). …. To the same extent, the School District as a public entity, sought out by the company only in the District's capacity as property owner, is permitted to do the same. And if the property owner, public or private, declines to enter into a lease without such a condition, the communications company is faced with a choice: the company may agree to the requested condition, or, if it is unwilling to do so, it may seek a lease

> elsewhere from a property owner who does not insist on such a condition. There is nothing in the conduct of the School District here that prevents Sprint from negotiating a lease on other property whose owner does not request conditions on emissions. …...
>
> In sum, *we conclude that the Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity* …[14]

The *Sprint* 2nd Cir. Court cited as authority two U.S. Supreme Court decisions:

> In determining whether such local action constitutes forbidden regulation, or instead constitutes permissible proprietary action, we find the Supreme Court's decisions in *Boston Harbor* [*Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc*., 507 U.S. 218, 224 (1993) (The Supreme Court found that when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute regulation subject to preemption.)] and *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc*., 475 U.S. 282, 286 (1986) ("*Gould*"), both of which involved the preemptive reach of the National Labor Relations Act ("NLRA"), to be instructive.[15]

Texas municipalities control the underlying rights-of-way on which light poles and utility poles are located.[16] They hold the public property in trust, as fiduciaries, to protect the public's

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[14] *Id*. Pp. 420-21(Italic emphasis added). With the 2nd Cir. Citing as authority two U.S. Supreme Court decisions, at, 417-18, "In determining whether such local action constitutes forbidden regulation, or instead constitutes permissible proprietary action, we find the Supreme Court's decisions in *Boston Harbor* [*Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc*., 507 U.S. 218, 224 (1993) (The Supreme Court found that when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute regulation subject to preemption.)] and *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc*., 475 U.S. 282, 286 (1986) ("*Gould*"), both of which involved the preemptive reach of the National Labor Relations Act ("NLRA"), to be instructive."; and also citing *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999) (No preemption).

[15] *Id*. at 417-18 (Italic emphasis added).2nd Cir. also citing *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999) (No preemption).

[16] In 1875 Texas cities were given "the *exclusive control and power over the streets, alleys and public grounds and highways of the city*…" Acts 1875, 14th Leg., 2nd C.S., p. 113, § 32. Recodified many times, now codified in the Tex. Transp. Code, §§ 311.001 [home rule city] and 311.002 [general law city]; and see also, Tex. Civ. Stat. art. 1175 [home rule city] "A home-rule municipality has the following powers …. [t]o prohibit the use of any street, alley, highway or

interest.[17] TML's Comments focused on a city acting in its proprietary capacity. In other words, as the owner of its rights-of-way. As such an owner, a Texas city is entitled, in its discretion, to determine if and when private entities may use the rights-of-ways—and set conditions for that use, just as the school district did on RF levels in *Sprint*.

IV. TML Reply Comments to Industry Assertions concerning Texas Cities.

A. AT&T:

AT&T's March 8, 2017, Comment made only general allegations concerning Texas cities, contrary to the request of the PN for specificity.[18] Accordingly, AT&T's Comments should be given little, if any weight in this proceeding.

AT&T did not name a single municipality in Texas. Therefore, TML cannot reply with any specificity. AT&T's general allegations are without merit, and are at best unrepresentative characterizations of what has occurred in Texas, as discussed below.

AT&T Comments at p. 7 refer to a Texas city that has a moratorium, but do not name it. With over 1,200 cities in Texas, it could not be determined if this claim has any merit. At page 8, AT&T asserts that Texas, as a jurisdiction, generally prohibits facilities in the rights-of-way. This is false on its face, as TML's March 8, 2017 Comments noted on pages 18-21, Austin, Dallas, Houston. San Antonio, and an array of smaller cities either have wireless faculties in the rights-of-way or are implementing agreements to allow them. San Antonio has allowed Verizon wireless facilities in its rights-of -way since at least 2014. AT&T has over 100 sites in Dallas alone.

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grounds of the city by any …. telephone…. company…. without first obtaining the consent of the governing authorities … and upon paying such compensation as may be prescribed ….”; Tex. Util. Code, § 54.205. “Municipality's Right to Control Access.” *See also, Southwestern Bell v. City of El Paso and the El Paso County Water Improvement District, Number 1*, 168 Fed. Supp. 2nd 640, 648 (2001) a city, unlike the water district, is “not limited in terms of their ability to “control and receive compensation for access to the municipality's public streets…” citing Tex. Util. Code § 54.205.

[17] *Texas Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637,645 (Tex. 2004) “As the State's agent or trustee, a municipality does possess a superior interest in its public roads vis-a-vis private citizens. the Legislature may grant cities and towns "exclusive dominion" over the public ways within their corporate or municipal boundaries. …. as has been delegated to them by the Home Rule Amendment to the Texas Constitution, art. 11, § 5, or by the legislature…. ".

[18] PN, at 9. (Italics added)

AT&T complains of "high fees" at p. 19, but does not acknowledge that, under the Texas Constitution, value-based fees are required for private use of public property. Governmental entities (e.g., cities) are prohibited from making "gifts of public property."[19] By law, such rental fees must be non-discriminatory. (TML March 8, 2017 Comments, pp. 7-15.)

B. Crown Castle:

Crown Castle asserts that two Texas cities, Austin and Sugar Land, generally prohibit deployment of small cells in their rights-of-way. Not only does Crown Castle incorrectly assert that Austin prohibits small cells, they essentially contradict themselves when they acknowledge that Austin allows small cells built by or contracted to be built for a CMRS provider. They state that Austin has "adopted an ordinance prohibiting any entity that is not a CMRS provider from deploying wireless equipment in public rights-of-way, flatly prohibiting network providers from placing their own facilities unless they partner with a CMRS provider." [20]

After going through an exhaustive stakeholder process, Austin's administrative program (not an ordinance) allow small cells to locate in the rights-of-way in an orderly, prudent way. Austin allows not only CMRS providers to use the rights-of-way, but also third party neutral host

[19] The constitutional requirement for value-based compensation for the private use of public property arises directly from the 1876 Texas Constitution, art. III, § 52 (a) and art. XI, § 3. Tex. Const. art. III, § 52 (a) "the Legislature shall have no power to authorize any …. city, town … to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever ..." Tex. Const. art. XI, § 3 "No … city, or other municipal corporation shall hereafter … make any appropriation or donation to the same, or in anywise loan its credit…." These constitutional provisions were a direct response to prevent a repeat of the dire financial consequences to local governments that had improvidently granted use of public property without value-based compensation to the then nascent railroad industry in the 1860s and 1870s. Moreover, in 1913, the Texas Legislature adopted the statutory enabling act for the Home Rule Amendment to the Texas Constitution, Tex. Civ. Stat. art. 1175, detailing a home rule city's police powers and authority to receive rights-of-way rental compensation.

In construing a similar prohibition applicable to the State, the Texas Supreme Court stated: "a gift or loan of the credit of the state … amounts to a grant of public money in violation of Article III, Section 51. The purpose of this section and of Article XVI, Section 6, of the Constitution is to prevent the application of public funds to private purposes; in other words, to prevent the gratuitous grant of such funds to any individual or corporation whatsoever …" *State v. City of Austin*, 331 S.W.2d 737,742 (1960).

[20] Crown Castle Comments, at 18.

providers or any other agent of a CMRS a license for rights-of-way traffic signal pole use when they are seeking a use on behalf of a CMRS provider. This ensures that there is no land speculation on prime locations. Austin's program emphasizes that its grant of private use of public property requires a public purpose and ensures that there must be a direct connection to the public (arguably the customers of CMRS are the public). The program is competitively neutral to all CMRS providers and their contractors.

Crown Castle also complains that Sugar Land generally prohibits deployment of small cells in the rights-of-way. As noted above, where the city is acting in its proprietary capacity in managing the rights-of-way, any use of the public rights-of-ways by wireless providers in Texas requires a separate express agreement by the city. A city *is not required to lease city property*, facilities, infrastructure to a wireless provider.[21] Therefore, no time lines or "delays" can be imputed for "failure"' to process applications in a "timely" manner, as claimed by Crown Castle, at least not in Texas. However, once permission has been granted to one provider, other providers must be treated similarly.

Crown Castle wanted to install wireless facilities in and around Sugar Land's Town Square development. It sought new towers or installation on "designer" street lights where all other wired facilities are underground. Sugar Land offered use of city water towers where space was available to install wireless facilities or collocate with existing wireless facilities. That alternative was rejected by Crown Castle.

Crown Castle mischaracterizes a pending administrative case before the Public Utility Commission of Texas ("PUC") when it states that "utility commissions have issued Crown Castle entities certificates to provide its wholesale transport services. However, the status of these service offerings has recently come into question in Texas …",[22] referring to *Complaint of Extenet Network Sys., Inc. Against the City of Houston for Imposition of Fees for Use of Public Right of Way*, Proposal for Decision, SOAH Docket No. 473-16-1861, PUC Docket No. 45280 (Tex/ State

[21] *Omnipoint Commc'ns Enters., L.P. v. Township of Nether Providence*, 232 F. Supp. 2d 430, 433-435 (E.D. Pa. 2002). "…Township's refusal to lease its own property does not constitute an exercise of zoning or regulatory powers, the Township had no duty under the TCA to negotiate or ultimately to lease portions of municipal property to Omnipoint for the purpose of installing an antenna."

[22] Crown Castle Comments, at 3, n. 7

Office of Admin. Hearings Feb. 24, 2017). The issue in that pending case is not the status of Crown Castle's certificate to provide service, but rather the principal issues in *ExteNet* is whether it may take advantage of a 1999 state law to place wireless facilities in the rights-of-way, which the Proposal for Decision that Crown Castle attached to its Comments details. Crown Castle also mischaracterizes the key aspect of that Proposal for Decision by the administrative judges as a "finding that unswitched point-to-point transport service to retail CMRS providers is not a wireless service…." Rather, the key aspect to that Proposal for Decision was a determination that *ExteNet could use the rights-of-ways under the 1999 law*. As TML noted in its March 8, 2017, Comments, that Proposal for Decision is preliminary and is being vigorously contested.[23]

It is the city's and TML's position in that litigation that the legislative grant to use the public-rights of ways in Tex. Loc. Gov. Code Chapter 283 is only allowed by certain defined entities that provide wireline services. These entities are certificated by the PUC to *offer* local exchange telephone service, and are termed "Certificated Telecommunication Providers" ("CTPs").[24] Wireless providers, including those with DAS facilities, even those that are federal "commercial mobile services providers"[25] (i.e., cellular telephone), are not included in Chapter 283 and they have no state legislative grant to use the rights-of-way. Therefore, a wireless commercial mobile service providers' request to use city property, be it for a tower, a small cell, or a DAS, must first have *separate* city authority to use city property or to install its facilities in the rights-of-way.

The non-discrimination provisions of Tex. Utilities Code, Sec. 54.204 (a) and (b) (1)[26] apply to CTPs. More broadly applicable is Tex. Utilities Code Sec. 54.204 (c), which sets the

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[23] TML Comments, at 16, with oral arguments set for April 13, 2017 before the full, three member PUC.

[24] Tex. Local Gov. Code., Sec. 283.002. Definitions. (2) "*Certificated telecommunications provider*" means a person who has been issued a certificate …by the commission to offer local exchange telephone service or a person who provides voice service.

[25] 47 USC § 332 (d)

[26] Tex. Util. Code, Sec. 54.204. Discrimination by Municipality Prohibited. (Italics added)

(a) "…a municipality or a municipally owned utility may not discriminate against a certificated telecommunications provider regarding: (1) the authorization or placement of a facility in a public right-of-way; (2) access to a building; or (3) a municipal utility pole attachment rate or term." (b)

maximum municipal conduit and pole attachments rates for "any entity" under "rules adopted by the Federal Communications Commission under 47 U.S.C. Section 224(e) … [and a municipality] shall charge a single, uniform pole attachment or underground conduit rate to all entities."

The non-discrimination provisions of private and *public* property owners in Tex. Utilities Code Sec. 54.259 applies to a "*telecommunications utility,*"[27] which is a broader term that CTP. Likewise, Tex. Utilities Code Sec. 54.260 (a) provides that private and *public* property owners may not "(3) discriminate against such a utility regarding installation, terms, or compensation of a telecommunications service facility to a tenant on the owner's property; (4) demand or accept an unreasonable payment of any kind from a tenant or the utility for allowing the utility on or in the owner's property."

C. NTCH:

NTCH complains of high rights-of-way rates for the City of El Paso, claiming they are $5,000.[28] TML contacted the City, and no one can determine where or how NTCH came up with that amount. El Paso has no specific fees for wireless facilities in the rights-of-way. It has only provisions in ordinances that have been applied to landline fiber runs in the rights-of-way. While the City of El Paso may have been contacted by a wireless provider concerning rates, there is no specific record of that inquiry as to rates, and there have been no complaints about or request for the City to revise or even revisit its rates for use of the rights-of-way in El Paso.

All public property in Texas that is used by private entities is rented for an amount equal to the value of the property, as is required by the Texas Constitution.[29] Therefore all users of the public rights-of-ways in Texas municipalities pay a value based fee (e.g., telecommunication

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"In granting consent, a franchise, or a permit for the use of a public street, alley, or right-of-way within its municipal boundaries, a municipality or municipally owned utility may not discriminate in favor of or against a certificated telecommunications provider regarding: (1) municipal utility pole attachment … rates or terms."

[27] Tex. Util. Code, § 54.002. Definitions (11) of "telecommunication utility" does not include a provider of "commercial mobile service", although subsection (E) of the definition includes a "communication carrier" broadly, which arguably could include a wireless provider.

[28] NTCH Comments, March 8, 2017, at 10.

[29] TML's Comments, at 7-13.

providers pay an access line fee under Texas Local Gov't Code, Chapter 283; cable providers pay a 5% gross revenue fee, Texas Utilities Code, Chapter 66, § 66.005 (a); electric providers pay a kwh fee based on the former gross revenue fee or an agreed to fee, Texas Utilities Code § 33.008; gas utilities pay at least a 2% of gross revenue fee (most pay 4%-5% by agreement), Texas Tax Code § 182.025 (c). To do otherwise would be discriminatory in violation of state law, cited above.

D. Sprint.

Sprint mentioned only one Texas City, and that was with praise to Houston on working with Verizon on the Super Bowl 2017 DAS deployment.[30]

E. Wireless Infrastructure Association (WIA):

The Wireless Infrastructure Association (WIA) comments are contrary to the request of the PN for specificity, rather they are general allegations.[31] Accordingly, WIA's Comments should be given little, if any, weight in this proceeding. As WIA did not name a single municipality in Texas, TML cannot reply with any specificity. WIA's general allegations are without merit, and are at best unrepresentative characterizations of what has occurred in Texas, as discussed in TML's Comments.

WIA Comments at p. 13 and 17 generally refer to a Texas city that has what they characterized as a moratorium, which was discussed above in the context of Sugar Land. At page 19, they also generally refer to "high" fees, or fees for "occupations" of the rights-of-ways being value-based. All public property in Texas that is used by private entities is rented for an amount equal to the value of the property, as is required by the Texas Constitution.[32] It would be discriminatory not to charge value-based rental fees for use of the rights-of-way to wireless providers when all other users in Texas pay a value-based fee.

[30] Sprint Comments, March 8, 2017, at iii, and 4, 7, 45-46.

[31] PN, at 9. (Italics added)

[32] TML's Comments, at 7-13.

F. ExteNet, Mobilitie, Verizon:

While not a reply, *per se*, TML would note that several industry comments that are particularly relevant to Texas did not complain of Texas or Texas cities. ExteNet, which has the two PUC administrative cases pending, did not mention them. Perhaps indicating that the only issues they have is the proper application of state law—a legal dispute over interpretation. Mobilitie, the petitioner, did not mention any Texas cities, although they are quite active in the state. Lastly, Verizon did not mention any Texas city, perhaps in part is because they have had an agreement with San Antonio since for nearly three years which allowed them to install wireless facilities in San Antonio, including in and around the Riverwalk area of San Antonio, near the Alamo. This absents of specific complaints is telling.

CONCLUSION

Texas cities, as are cities across the country, are revising city codes and negotiating reasonable license agreements to accommodate wireless facilities in the rights-of-ways. However, what is done to accommodate placement of wireless facilities rights-of-way in the plains of Nebraska versus rights-of-ways on the Texas coast, subject to hurricanes, are different. The conditions are different, so treatment should be different. Respectfully, TML would ask that the FCC review the best practices nationwide and share those, while accommodating, on a case by case basis, different terms and conditions in different locales.

Respectfully submitted,

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